BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY LEE BRACKEN Claimant	)	
VS.	)	
KANSAS MASONRY CONST., INC. Respondent	)	Docket No. 91,096
AND	)	
IOWA NATIONAL MUTUAL INS. CO. Insurance Carrier	)	

ORDER

Claimant requested review of the October 6, 2006 Post Award Medical Award by Administrative Law Judge Bryce D. Benedict. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

APPEARANCES

Frank D. Taff of Topeka, Kansas, appeared for the claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the post award record and adopted the stipulations listed in the Award.

ISSUES

This is a post award proceeding for additional medical treatment. The claimant suffered a serious closed head injury in 1980. As a result of that injury he was awarded continued medical treatment with neurologists. After the award was entered, claimant began receiving chiropractic treatment for his low back complaints. Over the years the intermittent chiropractic treatment would provide relief for his back complaints until the next episode of back pain. By 2005 the chiropractic treatments no longer provided relief for

claimant's back and increasing leg pain. The chiropractor recommended referral for an orthopedic consultation. Respondent referred claimant for a second opinion. The respondent's medical expert opined that claimant's current medical condition was caused by his work with his present employer and not related to his accidental injury in 1980. Claimant argued his current condition is a natural and probable consequence of the 1980 accident.

The Administrative Law Judge (ALJ) found the claimant's current need for medical treatment is due to his ongoing employment with U.S.D. #501, his employer since 1989, and therefore denied claimant's request that respondent provide additional medical treatment for claimant's back complaints.

The claimant requests review of whether the ALJ erred in finding the claimant's current need for medical treatment is attributable to his employment with U.S.D. #501; and, whether the ALJ erred in not awarding attorney fees and expenses pursuant to K.S.A. 44-510k.

Respondent requests the Board to affirm the ALJ's determination that claimant failed to meet his burden of proof that his current condition is the natural and probable consequence of his work-related accident in 1980.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by the respondent as a forklift operator and laborer. On June 11, 1980, the claimant fell approximately 18 feet from scaffolding at Topeka High School and landed on his head. The claimant suffered a skull fracture and closed head injury with post-traumatic epilepsy. Claimant was also diagnosed with right hemiparesis of the arm and leg due to his brain injury. Claimant received treatment from neurologists for his ongoing seizure problems.

On June 21, 1982, the ALJ entered an award of compensation in favor of the claimant which granted ongoing medical treatment with the neurologists, Drs. John B. Runnels or Jonson Huang. The medical records and deposition testimony of Drs. Runnels and Huang from the original proceedings clearly establish that claimant was being provided treatment for his seizures. Claimant was not being treated for low back pain at the time of the original award. And other than some general complaints in the emergency room records at the time of the accident the claimant did not initially have low back complaints.

One of the designated treating neurologists, Dr. Huang, noted in his December 29, 1982, progress note, that the claimant complained of low back pain present since the

accident without lower extremity radiation. The report further noted that in regard to the low back pain of indeterminate etiology, the doctor recommended spine films. The follow-up visit dated January 5, 1983, indicated the spine films revealed no significant abnormalities.

Dr. Huang's progress note dated February 4, 1983, indicated that claimant had sought chiropractic treatment in the interim. In Dr. Runnels' progress note dated February 14, 1983, there was a history that claimant developed back pain while standing in his yard and a CT scan was scheduled. The CT scan revealed a small midline annular protrusion at L5-S1 but surgery was not recommended. In 1984 claimant returned to Dr. Huang with complaints of progressively worsening low back pain with bilateral legs. A CT of the lumbosacral spine revealed minimal abnormalities and the EMG was within normal limits.

As noted the claimant began chiropractic treatment for his low back complaints. The treatment began with Dr. Rex Wright. In the mid 1990s, Dr. Wright retired and sold his business to Dr. Rusnak. So the claimant continued to receive intermittent chiropractic treatment with Dr. Rusnak. Dr. Rusnak performed manual adjustments on the claimant's left and right side as well as in his neck. Apparently, the respondent and its carrier made payments for this treatment and after the original insurance carrier, Iowa National Mutual, went into bankruptcy, the Kansas Insurance Guaranty Association continued to pay for the chiropractic treatments until the present.

In 1989 the claimant began working for U.S.D. #501 at the service center. He is still working at U.S.D. #501. Claimant testified he has not had any intervening accidents. Approximately two years ago, the claimant's job duties changed with U.S.D. #501. The claimant had been working outside mowing, weed eating and performing grounds work but this job was eliminated and he was moved to the garage as a mechanic. The claimant described his mechanic job:

> Q. Well, how is your work different now as far as bending, stooping and lifting as it was before you got into the mechanic area?
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> A. Well, there is -- I am doing more now. I get down on a creeper and, you know, roll around underneath the car or something. If I move just right on it, it will push it out. It will aggravate it. Sometimes I will leave work. I just leave work. Tell them that I have to go. Sometimes I have been off three days or four days and any time you go past three days you have to have a doctor's excuse. So the doctor's excuse always comes from Doctor Rusnak.
>
> Q. Okay.

A. And my supervisor understands.[1]

Claimant testified he is having increased symptoms and is being treated by Dr. Rusnak up to three times a week.

Dr. Rusnak described the episodic treatment he had provided claimant over the years and that in approximately 2005 the claimant's condition stopped responding to his treatment modalities. Dr. Rusnak also reviewed the treatment records from when Dr. Wright had provided claimant treatment and noted how such episodic treatments were frequently attributed to aggravations claimant suffered at work. And Dr. Rusnak agreed that claimant's history contained aggravation and acceleration of his underlying condition since 1980.

Dr. Huang examined claimant August 9, 2006, and suggested additional diagnostic testing before making recommendations for additional treatment. The doctor did not relate claimant's condition to his 1980 injury and simply noted that claimant had not told him about any other injury. But the doctor conceded he did not know what activities claimant had engaged in and further that he had not seen claimant between 1988 and the 2006 office visit.

Dr. Chris D. Fevurly reviewed claimant's medical records and performed an examination of claimant on March 28, 2006. The claimant provided Dr. Fevurly of a work history which indicated claimant had been forced to change jobs from landscaping work to auto mechanic. Dr. Fevurly testified the claimant described this change in work as causing a worsening of his back pain with more leg pain. The doctor concluded that claimant's current condition was the result of his present employment with the school district.

K.S.A. 44-510k provides that further medical care for a work-related injury can be ordered based upon a finding such care is necessary to cure or relieve the effects of the injury which was the subject of the underlying award. The controlling issue is whether claimant's present need for medical treatment for his low back complaints is directly and naturally related to the June 11, 1980 accident.

Claimant has the burden of proof to establish that his medical condition is a direct and probable consequence of the original work-related injury. The record presented at the post-award hearing is deficient in this regard. There is no expert medical opinion that claimant's present low back condition and need for treatment is a direct and natural consequence of the work-related injury established in the underlying Award. Instead, there is medical evidence that relates claimant's current low back condition to an aggravation or acceleration caused by his current work duties.

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[1] P.A.M. Trans. at 35.

The ALJ analyzed the evidence in the following fashion:

> The Respondent suggests that the Claimant's worsening condition is attributable to an intervening accident, i.e, an aggravation/acceleration caused by his most recent employment. The Claimant has not worked for the Respondent since 1980. For the previous seventeen years he worked for U.S.D. 501 as a maintenance man, but some time in 2004 he was involuntarily reassigned to a mechanic position. That position was considerably more physically demanding than the maintenance position, including more awkward positioning. In the Claimant's mind he was given a more demanding position as a means of getting rid of him. However, he has declined to file a claim against the school district as he believes this would lead to a retaliatory firing.
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> Dr. Fevurly testified that the Claimant's current need for treatment is attributable to his change in job duties at U.S.D. 501. In coming to this conclusion he relied considerably on the Claimant's own description of his mechanic duties, as well as the Claimant's own history of a significant increase in symptoms. Dr. Fevurly noted that before the recent change in duties that the Claimant had suffered from chronic, but relatively stable, low back pain. He did not opine that the Claimant's new duties had resulted in any permanent increase in impairment (as that term is defined by AMA Guides as a 3% increase in impairment), but there was at least a temporary exacerbation. In his written report Dr. Fevurly stated the Claimant needs to find a less physically demanding job.
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> The Court finds the Claimant's current need for treatment is attributable to his employment at U.S.D. 501, and therefore his request for additional treatment at the expense of the Respondent is denied.[2]

The Board adopts the ALJ's conclusion that claimant has failed to meet his burden of proof that his current low back condition is related to his 1980 work-related accident. Consequently, the ALJ's denial of claimant's request for treatment is affirmed.

Claimant next argues the ALJ erred in failing to award attorney fees and expenses. The claimant's submission letter to the ALJ listed attorney fees as an issue and an itemized billing statement from the claimant's attorney was attached to the submission letter. But the subject of attorney fees was not raised at the post-award hearing.

The post-award medical statute, K.S.A. 44-510k(c), provides, in part:

> The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that

[2] ALJ P.A.M. Award (Oct. 6, 2006) at 2-3.

become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

K.S.A. 44-536(h) provides that disputes regarding attorney fees are to be addressed first by the ALJ. As this issue was not addressed by the ALJ, the request for attorney fees and expenses is remanded to the ALJ for further proceedings, if necessary.

AWARD

WHEREFORE, it is the decision of the Board that the Post Award Medical Award of Administrative Law Judge Bryce D. Benedict dated October 6, 2006, is remanded for further proceedings, if necessary, regarding claimant's request for attorney fees and expenses and affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of January 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge